

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Release of Customer Information During 9-1-1 Emergencies

RM-10715

Comments of the
Electronic Privacy Information Center
August 15, 2003

The Electronic Privacy Information Center (EPIC) submits these comments in response to Commission Public Notice DA-03-1952 (rel. June 16, 2003), seeking comment on the National Emergency Number Association (“NENA”), the Association of Public Safety Communications Officials- International, Inc. (“APCO”), and the National Association of State Nine One One Administrators (“NASNA”) Petition for Rulemaking, which requested that the Commission initiate a proceeding on the legal preconditions to the release of customer-specific information. *National Emergency Number Petition* (filed May 2, 2003) (“*Petition*”). EPIC supports the petition and urges the Commission to initiate and speedily complete such a rulemaking. EPIC believes that the issues raised by this petition are important because it is critical that consumers maintain meaningful control over the disclosure of their location information. A rulemaking will provide useful guidance to the emergency services industry and set expectations for customer privacy for telecommunications service providers and consumers alike.

EPIC is a non-profit research and educational organization that examines the privacy and civil liberties implications of emerging technologies. As a leading advocate

for privacy and consumer rights, EPIC has identified the development and use of location tracking systems as a significant new challenge for policymakers and the public at large.

As NENA *et al.* (“NENA”) have outlined, there are significant differences between and within civil (§ 222 of the Communication Act) and criminal statutes (18 U.S.C. § 2703 and § 2702) that must be reconciled to reduce industry confusion about when and how to disclose subscribers’ location information in emergency situations. As the example provided by NENA demonstrates (Exhibit A, attached to Petition), the emergency services industry is experiencing uncertainty about the law. The FCC should provide an explanation of how the statutes relate to each other so that wireless service providers will be better able to standardize their actions in emergency situations. Further, an elucidation of how the statutes interact will help to harmonize wireless providers’ disclosure policies. Such clarification is important because it will allow both emergency services and consumers to fully understand what user information is disclosed in emergency situations.

EPIC believes that it is particularly important that the Commission establish rules on two issues. First, EPIC agrees with NENA that the term “user” in § 222(d)(4) of the Communication Act must be interpreted with regard to whether it includes disclosure of the location information of a caller who is not personally in need of emergency assistance. As NENA has stated, there are many emergency situations in which people other than those in jeopardy call 9-1-1. Limiting disclosure of location information to users who personally require emergency assistance could increase response times in emergency. EPIC believes that NENA’s suggestion of interpreting § 222(d)(4) to allow disclosure of location information regardless of whether or not the caller personally needs

assistance fails to adequately address consumer privacy concerns. There may be situations in which a user calling emergency services on behalf of another person does not want his location information to be disclosed, or thinks such disclosure is unnecessary. Instead, EPIC suggests that the provision be interpreted to require the caller's consent before his location information can be disclosed when that caller does not personally require emergency services. Ideally, consent would be procured on a case by-case basis rather than as a blanket opt-in or opt-out statement. For example, if a caller does not personally need assistance, a dispatcher would ask if he consents to location disclosure at the time of the emergency phone call. In EPIC's view, the overall goal is to ensure that consumers have control over their information. If the Commission does not institute a consent requirement, a dispatcher may have more power than the consumer himself to exercise control over the consumer's information. A rulemaking by the FCC on this provision will allow wireless carriers to perform in a standardized fashion when disclosing location information to an emergency service.

Second, EPIC agrees with NENA that the discrepancy between 18 U.S.C. §§ 2703(c) and 2702(b) and (c) as to when a government entity can access customer records must be clarified. There is significant industry confusion between the "implied consent" interpretation of 18 U.S.C. § 2703(c) as described by NENA (*Petition* at 4), and the § 2702(b) and (c) provisions that allow disclosure only in circumstances of "immediate danger of death or serious physical injury." Reconciling this discrepancy is important so that communications providers act in a unified manner. However, EPIC advises against interpreting § 2702(b) and (c) broadly to include property at risk as a justification for disclosure, as NENA has suggested. The FCC should carefully consider the

consequences of a broader reading, which may induce situations in which a government entity is able to bypass applicable warrant or court order process for minor property emergencies. It is important to limit disclosure to government entities of a user's communications content and records to situations of immediate danger of death or physical injury so that control of location information remains with the customer, except in cases of serious emergencies.

Additionally, the FCC should provide guidance on two more statutes that were not cited by NENA in the *Petition*. Sections 2703(c) and 2702(b) differ on what type of information can be disclosed to a government entity. Section 2702 differentiates between disclosure of the contents of a communication [(b)(8)] and disclosure of a user's record [(c)(7)], while § 2703 addresses only disclosure of "information pertaining to a subscriber." The Commission should clarify what type of information is meant by "disclosure" in § 2703, as a vague reading may lead to the accidental release of a customer's location information that was unintended by the statute. The clearer these terms are, the easier it is for businesses to know what is expected of them in order to protect their customers' privacy.

EPIC notes that the Commission previously declined to initiate a rulemaking relating to location privacy issues. In *In re CTIA Petition for Rulemaking to Establish Fair Location Information Practices* (WT Docket No. 01-72) ("*CTIA Petition*"), the Commission stated that

because the statute imposes clear legal obligations and protections for consumers and because we do not wish to artificially constrain the still-developing market for location-based services, we determine that the better course is to vigorously enforce the law as written, without further clarification of the statutory provisions by rule.

(at 1). The circumstances that led to the denial of the *CTIA Petition* are distinguishable from the present circumstances. First, the aforementioned statutes do not impose clear legal obligations — if they did, the emergency response industry would not have deemed it necessary to submit a Petition for Rulemaking. This is demonstrated by the fact that wireless carriers have different policies concerning disclosure to emergency services, as mentioned in the *Petition* (at 5).

Further, the technology surrounding wireless devices is no longer nascent. Wireless service has been available in the United States since the early 1980s and wireless technology, like any other technology, constantly evolves. Commissioner Copps’ dissent in the *CTIA Order* concluded that Commission rules were necessary because “the absence of clarity will do more to constrain technology and consumer choices than Commission action ever would” (Statement of Commissioner Michael J. Copps at 2). EPIC believes that the present situation is similar: instead of acting as a constraint, a rulemaking will establish the boundaries necessary for service providers to protect their customers’ privacy as technologies evolve.

The NENA petition clearly demonstrates that regulatory action is necessary because the statutes’ meaning is subject to varying interpretations within the industry. The discrepancies discussed above are causing industry confusion as to what location information can be released to emergency services and government entities and when it can be released. Most importantly, the fact that the petition for rulemaking comes from the industry itself is a strong indication that the language in the aforementioned statutes requires interpretation.

CONCLUSION

The *Petition* should be granted and the Commission should initiate a rulemaking.

Respectfully Submitted,

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